Michael J. Malone and Bob Burkheimer d/b/a Sorrento Hotel *and* Hotel, Motel, Restaurant Employees and Bartenders Union, Local 8, AFL-CIO. Cases 19-CA-12766 and 19-CA-12831

March 7, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND ZIMMERMAN

On July 29, 1982, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief;[1] Hotel, Motel, Restaurant Employees and Bartenders Union, Local 8, AFL-CIO, the Charging Party, filed a reply brief; and the General Counsel filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[3]

[1] Respondent's request to reopen the record for the introduction of additional evidence is hereby denied as the record as made at the hearing is adequate for the purposes of our decision and the evidence Respondent seeks to introduce is neither new nor previously unavailable. In any event, even if the evidence were to be considered and credited, the outcome of this case would remain the same.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In our recent decision in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 408 (1982), we held that the protection of the Act does not extend to supervisors who are disciplined or discharged as a result of their participation in union or concerted activities. In so doing, we overruled those cases which held that a violation is established when the discipline or discharge of a supervisor is an "integral part" of an employer's pattern of unlawful conduct directed against employees, the theory on which the Administrative Law Judge relied in ordering Respondent to reinstate and make whole any supervisors discharged by Respondent. Accordingly, we conclude, for the reasons fully set forth in *Parker-Robb*, that there is no basis here for finding the discharge of the supervisors unlawful. The Administrative Law Judge's recommended Order is therefore modified to delete that portion of par. 2(d), fn. 31, extending the remedial order of this Decision to any supervisors discharged by Respondent on September 22, 1980. Additionally, the phrase "those terminated," contained in par. 2(d) of the Administrative Law Judge's recommended Order, is hereby clarified to encompass only statutory employees.

For the reasons set forth in his concurrence in *Parker-Robb*, Member Jenkins would affirm that portion of the Administrative Law Judge's recommended Order requiring Respondent to reinstate, with backpay, any supervisors discharged by Respondent on September 22, 1980.

In his recommended Order, the Administrative Law Judge also ordered Respondent to, upon the Union's request, reinstate pension and health and welfare coverages as they existed on August 1, 1980, and to make employees whole for any loss of benefits they may have suffered as a result of Respondent's unilateral changes. While we agree with this section of the Administrative Law Judge's recommended Order, in no event should it be construed as requiring Respondent to provide double coverage to its employees in these areas.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Michael J. Malone and Bob Burkheimer d/b/a Sorrento Hotel, Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 3 of footnote 31 of the Administrative Law Judge's Decision.
2. Insert "statutory employees" after "those" and before "terminated" in paragraph 2(d).
3. Insert "statutory employees on" after "terminations of" and before "September 22" in paragraph 2(e).
4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The hearing held in Seattle, Washington, on February 1-2, 1982, in which we participated and had a chance to give evidence, resulted in a decision that we had committed unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and this notice is posted pursuant to that decision.

Section 7 of the National Labor Relations Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT refuse to recognize and bargain collectively with Hotel, Motel, Restaurant Employees and Bartenders Union, Local 8, AFL-CIO, as the exclusive representative of our food and beverage and hotel employees in the appropriate unit embraced by the 1978–81 collective-bargaining agreement between Third Brigade Corporation and said Union, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT change any term or condition of employment of the employees in the aforementioned unit, including pension and health and welfare coverages, without first giving the above-named Union a chance to bargain over such change.

WE WILL NOT close portions of our hotel business, with attendant loss of unit work, without first giving the above-named Union a chance to bargain over the effects of such closure.

WE WILL NOT terminate an entire complement of unit employees, or a substantial portion thereof, without first giving the above-named Union a chance to bargain over the decision and its effects on those employees.

WE WILL NOT terminate or otherwise discriminate against employees to avoid having to recognize and bargain with the above-named Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their exercise of rights under Section 7 of the Act.

WE WILL recognize and upon request bargain collectively with the above-named Union, as the exclusive representative of our employees in the aforementioned unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed document.

WE WILL, upon request of the above-named Union, revoke any or all changes in pension and health and welfare coverages made without first giving the Union a chance to bargain, and, if requested, restore coverages as they existed up to August 1, 1980, maintaining such coverages as are restored until we negotiate with the Union in good faith to agreement or to an impasse in negotiations.

WE WILL make whole employees who worked in the aforementioned unit at any time on or after August 1, 1980, with interest, for any loss of benefits they may have suffered because of the changes in pension and health and welfare coverages made by us without first giving the above-named Union a chance to bargain.

WE WILL offer to those statutory employees terminated on September 22, 1980, if we have have not already done so, immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and make them whole, with interest, for any loss of earnings they may have suffered because of the discrimination against them.

WE WILL expunge from our files any reference to the terminations of statutory employees on September 22, 1980, and notify those terminated in writing that this has been done and that evidence of those unlawful terminations will not be used as a basis for future personnel actions against them.

MICHAEL J. MALONE AND BOB BURKHEIMER D/B/A SORRENTO HOTEL

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Seattle, Washington, on February 1 and 2, 1982. The underlying charges were filed on September 11 and October 3, 1980, by Hotel, Motel, Restaurant Employees and Bartenders Union, Local 8, AFL-CIO (the Union). The complaint issued on April 15, 1981, and alleges that Michael J. Malone and Bob Burkheimer d/b/a Sorrento Hotel violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) on and after August 8, 1980, by refusing to recognize and bargain with the Union as the representative of the hotel employees; and violated Section 8(a)(5), (3), and (1) on September 22, 1980, by discharging "substantially all" of the hotel employees without prior notice to, and for the purpose of eliminating, the Union.

I. JURISDICTION

The Sorrento is a Seattle hostelry. Its annual revenues, from room rentals and the sale of food and drink, exceed $500,000, and its annual purchases from outside the State of Washington exceed $50,000.

The Sorrento has been owned at relevant times by First Hill Investors (First Hill). As is later detailed, it was operated from August 1 through September 22, 1980, by Michael J. Malone and Robert B. Burkheimer, apparently as partners, under an "Interim Management Agreement," with First Hill; and has been operated from September 23, 1980, by a joint venture, as it is styled,

comprised of Malone and Burkheimer, under a 50-year lease agreement with First Hill.[1]

It is concluded that the entity of Malone and Burkheimer, however styled (hereinafter Respondent), has been the employer of the Sorrento employees continuously since Agust 1, 1980,[2] and as such has been and is engaged in activities affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED MISCONDUCT

A. *Facts*

The Interim Management Agreement was entered into and became effective on August 1. It was, by its terms, "in anticipation of a successful conclusion of negotiations" leading to a long-term lease agreement, and was to obtain for 120 days, "or until the earlier consummation of a lease agreement."[3] It provided, among other things, that Respondent "will take over the management of the Sorrento Hotel on August 1 . . . ." The anticipated long-term lease agreement, entered into September 23 and effective from that date until September 22, 2030, authorizes Respondent to operate "a parking garage, hotel, restaurant and cocktail lounge, and all activities of the type commonly conducted by restaurants and hotels of similar status in the metropolitan Seattle area . . . ."

The Sorrento had been operated from February 1972 through July 31, 1980, by Third Brigade Corporation (Third Brigade), under lease from First Hill.[4] At the time of Third Brigade's departure, the hotel had 150 guest rooms, some of which were uninhabitable because of deterioration, and one regularly open restaurant and bar, the Sir Dunbar. It also had two facilities for banquets and meetings, the Luau Room and the Top O The Town. The payroll consisted of approximately 25 nonsupervisory employees. About 15 were engaged in assorted food and beverage activities in connection with the Sir Dunbar, the rest performing housekeeping, desk-clerking, and other purely hotel-type functions. These employees were covered by a collective-bargaining agreement between Third Brigade and the Union, effective from June 1, 1978, through May 31, 1981.[5]

On August 1, coincident with its assumption of management responsibility under the interim agreement, Respondent placed a friend and former employee of Malone's, Diane Vukov, "in charge of" the hotel, giving her the title of manager and instructing her "to see that things really ran very much the same" as before.[6] As Malone testified:

> [T]here's no question as to what my and Burkheimer's role was during the period, and that was simply as an overseer of the operation to try and simply maintain the status quo of the restaurant and whatever activity within the hotel during the period of which we were trying to clear the title and sign a formal lease agreement.

Apart from Vukov's becoming manager, there were no major personnel changes either as an incident of Third Brigade's leaving or during the ensuing approximately 7 weeks that the interim agreement was in effect. The only changes were Vukov's hire of a dishwasher to replace one who had quit, and Malone's hire of two "handymen" to upgrade three guestrooms.

The Union learned of the change in management in early August, soon after its occurrence, during a chance encounter between its business manager, Mario Vaccarino and First Hill's managing partner, M. E. Burke. Burke disclosed that Third Brigade was out and that "a fellow named Malone was taking . . . over" operation of the hotel. Vaccariono asked if Malone was "going to be running it for" Burke. Burke answered no, that he was "just the landlord and it's [Malone's] baby."

In early August, as well, Vukov called the Union about the proper wage for an employee doubling as bartender and waitress. The employee had "made it very clear," according to Vukov, "that she was a union employee and [that] she wanted those [union] wages." Two telephone conversations with Vaccarino resulted. In the

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[1] The Interim Management Agreement, on its face, was between First Hill and "Messrs. Michael J. Malone and Robert B. Burkheimer (Malone/Burkheimer)." The 50-year lease agreement identifies the lessee as "The Sorrento Hotel Joint Venture." It was signed for the lessee by Malone and Burkheimer, and names them in the jurat as "the venturers of The Sorrento Hotel Joint Venture."

Malone testified that the joint venture was created September 23, preliminary to execution of the lease agreement, by a "formal, written" instrument; that it consists of Burkheimer, Malone, and Malone's wife, Mary; and that Burkheimer owns a 50-percent interest, Malone and Mary owning separate 25 percent interest. The lease agreement nowhere mentions Mary. A legal document executed in the name of the joint venture in March 1981, like the aforementioned jurat, states that it "is composed of" Malone and Burkheimer, making no reference to Mary.

Malone, in an attempted explanation of Mary's nonmention, testified that, while he alone or he and Burkheimer have signed for the joint venture "on numerous occasions," the two of them, plus Mary, have signed "on probably as equal number of occasions." Neither the instrument giving life to the joint venture, nor any other document purporting to show Mary's involvement in it, is in evidence.

It is concluded, based on the absence of documentary corroboration, the presence of counter-documentation in the form of the lease agreement and the March 1981 document, and the lack of conviction attending Malone's testimony on the point, that the joint venture does not include Mary, and is an entity indistinguishable for purposes of the Act from that which operated the Sorrento under the Interim Management Agreement. Malone's discredited testimony about Mary's participation presumably was intended to impart the illusion that the joint venture is an entity apart from the interim agreement's "Malone/Burkheimer," thereby creating distance between the joint venture and the alleged misconduct.

[2] As is more fully developed later, Respondent's argument is rejected that First Hill was the employer from August 1 through September 22. See text accompanying fns. 20 and 21, *infra*.

[3] In fact, according to Malone, the "basic terms" of the long-term agreement had been worked out possibly as early as late June or early July, leaving an unclear title as perhaps the only impediment to entry into such an agreement as of August 1. Malone recalled that the original title report contained over 30 exceptions—"an incredible financial fiasco as far as encumbrances."

[4] On July 31, in anticipation of the August 1 development between First Hill and Respondent and because economic hard times had prevented its meeting the terms of its lease, Third Brigade provided First Hill with a letter stating that it "waive[d] and release[d] any and all interest" in the lease "effective immediately," and had "abandoned the premises."

[5] It is concluded that the Union is a labor organization within Sec. 2(5) of the Act, and that the union embraced by the 1978-81 agreement is appropriate for purposes of the Act.

[6] Vukov, to become acquainted with the operation, had been a full-time "observer" on the premises, with Third Brigade's acquiescence, since mid-July.

first, Vaccarino "made some reference to the fact that there was a union contract," as Vukov recalled; and, in the second, he informed her that August pension and health and welfare contributions "on all employees" would be due September 10.[7] Sandwiched between the two conversations, the Union sent Vukov a copy of the master agreement between it and the Seattle Restaurant Association and the Seattle Hotel Association, along with a brochure "outlining the benefits and the scale."

On August 8, Vaccarino sent a letter to Malone stating:

> Hotel, Motel, Restaurant Employees and Bartenders Union is the certified bargaining agent of the employees of the Sorrento Hotel.
>
> As the successor to the previous owners, you are bound to honor the terms and conditions of the attached contract unless and until we negotiate different terms.[8]
>
> We look forward to working with you for our mutual benefit.

Malone replied by letter dated September 2, stating:

> I have received your letter of August 8, 1980, addressed to me at the Sorrento Hotel. I fear that you have been misinformed regarding the status of the Hotel's ownership and management.
>
> For the past eleven years or thereabouts, the Sorrento has been managed by the Third Brigade Corporation under a lease with the owners of the property, First Hill Associates. Neither I, nor my partner, Bob Burkheimer, have any interest in either Third Brigade Corporation or First Hill Associates. It is my understanding that Third Brigade has defaulted on its lease obligations. My partner and I have expressed an interest in negotiating a lease with the owners of the property, First Hill Associates, and have, for some time, been engaged in negotiations which may lead to an agreement. These negotions [sic] have not, to date, been finalized, however. In conjunction with the owners of the property, and in order to avoid damage or deterioration to the hotel's assets, we have placed an observer on the premises.
>
> In the event that we secure a lease from the property's owners, we do not intend to assume any of the prior tenant's obligations. In addition, we intend to make significant changes in the hotel's organization, physical plant, and personnel. We would not, under the circumstances consider ourselves to be the "successor" to the Third Brigade Corporation.
>
> Persons employed by the present operators of the Sorrento will, of course, be eligible for employment by our company in the event a lease is finalized. We will, if you wish, be happy to provide you with the application forms to be filled out by present employees. Those present Sorrento Hotel employees seeking work after the execution of a new lease will be considered on their merits.
>
> If you should desire further information regarding our plans, please feel free to contact me.

Upon receiving Malone's letter, Vaccarino confronted Burke by telephone, citing the discrepancies between it and Burke's prior representation to him. Burke stated, much as before, "All I am is the landlord, and Mike Malone is the proprietor." This presumably triggered the first of the charges herein, filed September 11.

The stability of the employee complement was shattered September 22—the day before the long-term lease became operative. All personnel were summoned to a meeting that afternoon, to be given termination notices. The notices, over Burke's name, stated:

> Re: Termination of Employment
>
> TO EMPLOYEES OF THE SORRENTO HOTEL:
>
> As you may know, Third Brigade Corporation has defaulted in its leasehold obligations and has not operated the property since August 1, 1980. In the meantime, First Hill Investors has arranged for Malone/Burkheimer to carry on operations on a caretaking basis pending negotiations of a lease. Negotiations have been completed and it is anticipated that a lease will be signed on September 23, 1980, whereby the joint venture will take over operations.
>
> As of September 22, 1980, First Hill Investors will no longer operate the hotel and restaurant. This letter is to notify you that employees of the restaurant and hotel are terminated effective September 22, 1980. The new operators advise that present Sorrento employees will be eligible for employment by the new tenants. If you wish to apply for a position with the new tenants, you should obtain and

[7] Vukov also had a telephone conversation in August with Ellen Carney, a business agent for the Union. Carney testified that she asked if Vukov would need help filling out the forms to be submitted with contributions to the Union's health and welfare plan; and that she offered to meet with Vukov and go through the bargaining agreement "page by page." Vukov replied, according to Carney, that she would not need help with the forms because she had already spoken with the health and welfare office, which had been "most cooperative," but that she was "looking forward to" going through the agreement. Carney, added that such a meeting never materialized.

Vukov testified that, while she had a conversation with a woman from the Union, whose name she could not recall, she remembered it as concerning health and welfare forms, and that the woman said she would place some in the mail. Vukov assertedly had no recall of any reference in this conversation to the bargaining agreement.

It is not necessary to resolve these testimonial discrepancies between Carney and Vukov.

[8] Respondent, through Malone, introduced in evidence a contract document asserted by Malone to have accompanied Vaccarino's letter. The document, which identifies the employer-party as "Third Brigade Corp., dba Sorrento Hotel," contains food and beverage, but not housekeeping, classifications. Vaccarino testified that the Union had never agreed with Third Brigade to the exclusion of housekeepers from the unit, that he "never sent out a partial contract" to Malone, and that "it would appear" that the page dealing with the housekeeping classifications had been removed. Vaccarino added that, while food-and-beverage and housekeeping employees are treated as in separate units in some hotels, this was not so at the Sorrento. The master agreement received by Vukov contained both categories of classification.

complete an application form. Applications are presently available at the Front Desk of the hotel.

Malone "started off" the meeting by introducing Burke, who more or less recited the contents of the notices. Malone then announced that the Sir Dunbar would be closed for "about four weeks" for renovation, but that the hotel "would stay open"; and, echoing the notices, that application forms were available for those interested in rehire. Most of the deposed employees submitted applications following the meeting.

Respondent gave the Union no word of, much less opportunity to bargain about, the terminations and the impending closure of the Sir Dunbar. Hence, the second charge, filed October 3.

The Sir Dunbar in fact was closed for about 8 weeks, reopening November 25 as The Hunt Club. The Sorrento offered no food or beverage service in the meantime, obviating immediate rehire or replacement of the discharged food and beverage employees. When The Hunt Club opened, the space having been "gutted" and completely rearranged and reappointed in the interim, it was staffed by all new personnel—some 23 in all, of whom 4 were considered supervisory.

The hotel proper stayed open without disruption until December 3, when it was closed for a thorough overhaul, re-equipping, and refurnishing, which took a year to complete. Vukov, retained as manager, testified that she "really just kept things running as they had been before" until the closure. Aside from her, the hotel was staffed after September 22 by four carryovers dating back to Third Brigade's time, along with the two handymen previously mentioned and eight without prior Sorrento experience. The carryovers were rehired promptly after the formality of being terminated September 22, the decision concerning whom to retain having been made in the preceding week or so. The new hires, similarly, were recruited during the preceding week.[9]

Those carried over included the former food and beverage manager, who was assigned to the front desk; two former front desk employees, who were retained in those positions; and one housekeeper, who continued in that capacity. Vukov testified that these were "key people" whom she felt "could be of a great deal of assistance to [her], with [her] lack of knowledge" of the hotel business. Others were not retained, she asserted, because, "by watching their ability, their work, what they had done," she felt "they weren't qualified." Vukov's effort to bulwark this assertion, employee-by-employee, was a labored and unimpressive mix of abstractions, conjecture, and flawed recall.[10] She admittedly warned no one about poor work before September 22, seeing her "role" as "reassuring the employees that their jobs were not in jeopardy." She denied that union affiliation figured in anyone's nonretention, noting that, in her search for replacements, she made a point of interviewing some of the employees of the Olympic Hotel, a union house about to close.

Everyone on the hotel side—carryovers and new hires alike, Vukov included—was terminated coincident with the December 3 closure. None of them, nor anyone on the payroll before September 23, was among the staff of 89 when the hotel reopened December 7, 1981. The developments of December 3, like those of September 22, were not attended by any kind of notice to the Union.

The employees first learned that a change in management was forthcoming in July 1980, when Antonio del Fierro, Third Brigade's president, introduced Malone at an employee meeting as "the person who would be taking over." Malone then summarized some of the innovations under consideration for the hotel, and gave assurances that those wanting to stay would have jobs.

That was followed by an employee meeting on August 3, presided over by Malone and prompted by Respondent's assumption of management responsibility under the Interim Management Agreement. The "purpose and intent" of the meeting, in Malone's words, "was to establish some dialogue with the employees, to allow them to ask questions, and . . . make them feel more comfortable." Malone announced that he was now "running" the hotel and introduced Burkheimer as his "associate in the venture." He introduced Vukov, as well, stating that she was "the manager of the hotel" and that the employees were to "go to her" with any problems, because she would be "speaking for" him.

Malone told the employees during the August 3 meeting, much as he had in July, that their jobs were "not in jeopardy." He elaborated that, while major improvements were contemplated, the hotel was "definitely going to keep operating," with guestrooms being refurbished "two or three at a time" or "floor by floor." Renovation of the kitchen would pose more of a "problem," he continued, but that, too, could be "work[ed] around," enabling the Sir Dunbar to stay open.

During the question and answer portion of the meeting, Renee Crumpacker, a cocktail waitress, asked how Malone felt "about the union contract." He responded, as disclosed by the weight of the evidence, that the Sorrento was a "weak" or a "very loose" union house; that another of his ventures, the Broadway Restaurant in Seattle, was nonunion and those working there, including some who had worked in union houses, were "quite happy" and "worked very well together"; and that he paid "better than union scale" and "took care of" his employees. Malone added that he could "handle the affairs of" the Sorrento employees without need for "anybody

[9] Those not retained, when invited on September 22 to submit applications, did not know that their replacement already had been procured. Vukov testified that there was "quite a bit of turnover initially" among the new hires, "because they were not willing to undertake getting a room really clean." The former employees were not sought as replacements when this happened.

[10] Thus, Vukov testified that she "would imagine" one was not rehired "because of the quality of work," but that she could not "think of anything specific" in that respect; that another was not retained "because of lack of quality work," to which she added that the housekeeping employees in general "just got by with the work they did"; that "it would be the same type of an answer" regarding another; that she could not "recall exactly" as concerns another—"I think simply because there was no need . . . it could have been timing." Another was not retained, according to Vukov, because "his quality of work . . . was very inconsistent"; another, because he "had a very set way of doing things and was not receptive to changes"; and another, because she "was only working part-time . . . and we needed the fulltime people." This last person was not offered a full-time position.

else [to] oversee" him; that he did not "deserve to be an owner" if he could not.

Later in August, or perhaps early September, a group of day-shift food and beverage employees met with Vukov, voicing concerns about job security. She told them, "As long as you do a good job, you'll keep your job."

The decision to close the Sir Dunbar, rather than work around the remodeling process, was made in September, after Henry Odland, soon to be restaurant manager, toured the facility and determined that the requisite changes "couldn't be done without closing it."[11]

Odland testified that he was "involved in hiring all" the employees for The Hunt Club; that help-wanted advertisements were placed in the "Seattle Times" for 5 days, 2 or 3 weeks before the reopening: and that, while there were about 10 applicants for every position, none of the former employees responded. Odland further testified that he was unaware of the applications left by the former employees, and that union affiliation or lack thereof were not among the hiring criteria. He continued that he was looking for "a certain level of experience"—"the main concern is that it looks as though it's not a new operation." "And then," he added, "what our duty is is to train them to exactly what we are serving . . . what the different types of wine are, and the same thing with the food."[12]

The decision to close the hotel proper, instead of renovating two or three rooms at a time or floor-by-floor, was reached in late November, subject to financing, following consultations that month with structural engineers, architects, and contractors. A financing commitment materialized around December 1. The project reduced the number of guestrooms and suites to 76, and cost $4 million.

David Ruehlmann, general manager of the reopened hotel, testified that prior experience in "a large corporate hotel" was "one of the foremost things" sought of those hired to staff the Sorrento upon reopening, and that those serving before the closure lacked "the kind of experience that [he was] looking for." He conceded, however, that some hired as housekeepers incidental to the reopening had to be trained, and that others had to be shown how the management "wanted things done." Ruehlmann learned in the summer of 1981—months before the reopening—about the applications left by those terminated the preceding September 22, but gave them no consideration. Some of those hired, according to him, previously had worked in union hotels in Seattle, such as the Olympic and the Westin.

The Interim Management Agreement, in addition to stating that Respondent "will take over the management of the Sorrento Hotel on August 1" in anticipation of the entry into a long-term lease agreement, provided variously:

(a) Respondent "shall receive no compensation for the management of the Hotel during the interim period . . . [and] . . . agree[s] to pay any excess cash flow . . . from the operation of the Sorrento Hotel to First Hill."

(b) Respondent "agree[s] to indemnify First Hill against any liabilities, expenses, claims, demands and damages arising out of the negligent management of the Hotel."

(c) Respondent "agree[s] to obtain appropriate federal and state tax identification numbers . . . and to pay to such tax authorities as though [Respondent] were the operator of the Hotel."

The agreement concluded:

> Notwithstanding the foregoing, it is clearly understood and agreed . . . that First Hill is the owner and operator of the facilities and that [Respondent] is acting as an agent of First Hill pending the negotiation of a lease to the premises.

On or about August 1, in keeping with the interim agreement, Respondent obtained Federal and state tax numbers in its name, as well as the sundry city and state permits required to operate a hotel and eating and drinking establishment. That included a liquor license, which, by state law, had to be in the name of "the true party in interest."

Respondent in addition supplied cash register moneys in replacement of those removed by Third Brigade when it vacated; contracted for a payroll service, on the recommendation of its accountant, Robert Tiehan; and opened a bank checking account, from which wages and other operating expenses were to be paid and into which hotel revenues were to be deposited. The account, although in the name of First Hill, was "seeded" by funds from Respondent, and only Malone and Vukov could make withdrawals from it. First Hill made no infusions of operating capital during the interim period.[13]

Despite the checking account being in First Hill's name, Burke's name being on the September 22 terminating notices and Burke having spoken at the time of their distribution, and the avowal in the interim agreement "that First Hill is the owner and operator . . . and that [Respondent] is acting as an agent of First Hill," there is no convincing evidence that First Hill, or Burke as its managing partner, played any role in the management of the hotel during the interim period, either in collaboration with or independently of Respondent.[14] Not only did Burke twice declare to Vaccarino that he was only the landlord, but Respondent installed Vukov as manager, with power to hire, fire, set wage rates and hours, assign work, make purchases, and draw checks. Vukov testified, moreover, that she reported only to, and took direction only from, Malone and Burkheimer, and "possi-

[11] Odland was employed at Malone's Broadway Restaurant at this time.

[12] The Hunt Club featured *nouvelle cuisine*, complimented by a wine list of 35 to 40 offerings, according to Odland, whereas the Sir Dunbar employed "more of a griddle surface."

[13] While the interim agreement was not altogether clear on the point, it contemplated that the hotel's expenses would be met from ongoing revenues.

[14] Burke did not testify.

bly" Respondent's accountant, Tiehan.[15] She explained, "That's who I was responsible to."[16]

Vukov testified that her only contacts with Burke during the interim period were when he and his wife came into the hotel one evening, "and we visited for a . . . short period"; and when, preliminary to the execution of the long-term lease agreement, she delivered some "paperwork" to Burke's office, leaving it with his secretary.

Except for "a couple of instances," according to Vukov, wages after August 1 stayed as they had been—that is, in conformity with union scale. As previously mentioned, she called the Union in August because a question had arisen over the appropriate pay for a dual-purpose employee.

Respondent, however, did not adopt Third Brigade's practice of contributing to the Union's pension and health and welfare plans, as prescribed by Third Brigade's agreement with the Union, thus ignoring Vaccarino's instruction to Vukov that contributions for August would be due September 10. Vukov testified that, after discussing the situation with Malone or Burkheimer, it was her "understanding" that it "may not have been our responsibility to make those payments." Respondent instead obtained health insurance for the employees which, as Vukov recalled, "was similar to the coverage that one of Mr. Malone's other companies had." The Union was given no notice of, or chance to bargain over, the discontinuance of the existing plans and the institution of the new.

Vukov testified that the process undertaken on about August 1 with respect to tax numbers, licenses, bank accounts, etc., was repeated on or about September 23, when the long-term lease went into effect—"it was just like setting up a new business." Except for the matter of bank accounts, this testimony—unsupported by documentation or specifics—was not convincing. Malone testified that a new liquor license was not required.

Sorrento's residential clientele as of August 1 included transient and permanent guests. Among the former were army inductees, housed under contract with the Government at a daily room and board rate of $19 per person. Daily rates for the other transient guests were $25 to $30, which did not include board. The record suggests that, on or about September 23, a phasing out of the permanent guests was begun and the Government contract terminated. Otherwise, as earlier indicated, the hotel proper was run much as before until its December 3 closure.

Since reopenings in December 1981, the Sorrento's daily rates have ranged from $60 for a single room to $575 for a penthouse suite, the average being about $80. It is "very, very service oriented," according to Ruehlmann, and "solicit[s] the upper-scale business-type traveler, as well as your corporate traveler; more of a distinguished type guest, as well, perhaps a dignitary or a celebrity." Among the amenities since the reopening, but not before, as recounted by Ruehlmann, are uniformed employees, valet parking, doormen, bellmen, telephone operators, room service, triple-sheeted beds,[17] and evening turn-down of bed covers, replete with a mint on the pillow.

B. *Conclusions*

1. The allegedly unlawful refusal to recognize and bargain

It is concluded that Respondent became a "successor" to Third Brigade upon taking over management of the Sorrento August 1; that it therefore inherited Third Brigade's outstanding obligation to recognize and bargain with the Union as the representative of those in the unit embraced by the 1978–81 agreement between Third Brigade and the Union; and that its subsequent refusal to recognize the Union accordingly violated Section 8(a)(5) and (1) as alleged.[18]

That Respondent is Third Brigade's successor derives from its retention of the Third Brigade payroll, nearly intact, for some 7 weeks after August 1; its effort during that same period, as Vukov put it, "to see that things really ran very much the same" as before; and the substantial continuation during that time, except for discard of the Union's pension and health and welfare plans, of preexisting terms and conditions of employment.[19]

Respondent's main contention is that First Hill, not it, was the "owner and operator" from August 1 through September 22, the implication being that the date for determining its successorship status properly should be September 23—after the mass termination and coincident with the extended closure of the food and beverage facility. This contention, as earlier indicated,[20] is rejected. Rejection is based on this aggregate of considerations:

1. The Interim Management Agreement specified that Respondent would "take over the management of" the hotel on August 1, that it would "indemnify" First Hill for any losses "rising out of the negligent management of" the hotel, and that it would obtain Federal and state tax numbers and "pay to such tax authorities as though [it] were the operator of" the hotel.

2. Respondent installed Vukov as manager on August 1, investing her with authority commensurate with that

[15] Vukov testified that she made revenue and occupancy reports to Malone and Tiehan, as requested by Malone. Malone testified that he "would subsequently either meet with or have conversations with Mr. Burke." The record does not disclose the frequency or content of these exchanges between Malone and Burke.

[16] Vukov nevertheless testified that she was an employee of First Hill, perhaps because her paychecks—and those of all the employees—were drawn on the account in its name.

[17] The third sheet being on top of the blanket.

[18] That the contract document accompanying the Union's August 8 demand letter may have omitted housekeeping classifications (see fn. 8, *supra*) does not relieve Respondent of a duty to bargain as concerns the overall unit. The letter itself couched the demand in terms of "the employees of the Sorrento Hotel," the Union's agreement with Third Brigade in fact covered housekeeping as well as food and beverage employees; and there is nothing to suggest that the professed incompleteness of the document in any way confused or misled Respondent. Cf., *Nazareth Regional High School* v. *N.L.R.B.*, 549 F.2d 873, 880 (2d Cir. 1977).

[19] See, generally, *N.L.R.B.* v. *William J. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *East Belden Corporation*, 239 NLRB 776 (1978); *Cagle's Inc.*, 218 NLRB 603 (1975); *Pine Valley Division of Ethan Allen, Inc.*, 218 NLRB 208 (1975); *Band-Age, Inc.*, 217 NLRB 449 (1975); *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB 529 (1974); *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234 (1972); *G. T. & E. Data Services Corporation*, 194 NLRB 719 (1971).

[20] In fn. 2, *supra*.

title; after which she reported only to, and took direction only from, Malone and Burkheimer and possibly Respondent's accountant.

3. On or about August 1, Respondent obtained, in its name, the city and state permits needed to operate a hotel and eating and drinking establishment. This included a liquor license, which was required by state law to be in the name of "the true party in interest."

4. On or about August 1, Respondent supplied cash register moneys in replacement of those removed by Third Brigade; and "seeded" with its funds the bank checking account from which hotel expenses were paid and into which revenues were to be deposited.

5. Only Vukov and Malone could make withdrawals from the aforementioned checking account.

6. By the time of Respondent's August 1 assumption of management responsibility, its prolonged continuation in that role was a virtual certainty, the "basic terms" of the long-term lease agreement previously having been worked out.

7. First Hill's Burke twice told the Union's Vaccarino, between August 1 and September 23, that he was nothing more than a landlord.

Against this array of indicia that Respondent was the true employing entity as of August 1, the meager signs of First Hill's occupying that role—that the checking account was in its name, that the termination notices bore Burke's name and that he spoke at the time of their distribution, and that the interim agreement depicted First Hill as "the owner and operator" and Respondent "as an agent of First Hill"—are but trifling oddments.[21]

Nor can it be said that maintenance of the status quo until September 22 was a temporary expedient, militating that the issue of Respondent's successorship status consider the changes subsequently made. Malone assured the employees in July and again on August 3 that their jobs were safe, to which he added on August 3 that, while considerable changes in the physical plant were contemplated, they would not entail job disruption. Similarly, Vukov told some of the food and beverage employees during the interim period that they would have their jobs as long as their performance was acceptable; and admittedly saw part of her role until September 22 as "reassuring the employees that their jobs were not in jeopardy." Additionally, the decision to shut down the Sir Dunbar for renovation in fact was not made until September; and that to close the hotel proper, not until late November.

It thus is manifest that the departures from the status quo—beginning with the September 22 mass termination and followed by the closures of the Sir Dunbar, then the hotel proper, and the eventual marked enlargement of the complement—were not "imminent and certain" as of August 1, but rather were in the realm of high speculation. Those developments consequently are not relevant to the successorship question.[22]

Having violated Section 8(a)(5) and (1) in a general sense by refusing to recognize the Union, Respondent perforce breached its duty to recognize and bargain in more specific ways by these actions:

1. Discontinuing the Union's pension and health and welfare coverages, and instituting a new medical insurance program, without first giving the Union a change to bargain over the changes.[23]

2. Terminating the entire complement on September 22, albeit momentarily as concerns some, without first giving the Union a chance to bargain over the decision and its effects.[24]

3. Closing the Sir Dunbar and then the hotel proper, with attendant loss of unit work for substantial periods of time, without first giving the Union a chance to bargain over the effects of those actions.[25]

2. The allegedly unlawful mass termination

It is concluded that the September 22 mass termination, apart from violating Section 8(a)(5) and (1) as earlier found, was for the purpose of escaping successorship and the attendant obligation to recognize and bargain with the Union, and thus violated Section 8(a)(3) and (1) as also alleged.

This conclusion derives from this reasoning:

1. Respondent's antipathy to collective bargaining was betrayed by Malone's declarations during the August 3 meeting that he could "handle the affairs of" the employees without need for "anybody else [to] oversee" him, and that he did not "deserve to be an owner" if he could not.

2. Respondent could escape Third Brigade's bargaining obligation if it could avoid being adjudged a successor. Employee carryover being central to a successorship finding, the substantial elimination of the preexisting complement, if timely done, would accomplish this.

3. Why, then, was the mass termination not effected at or around the time of Respondent's August 1 assumption of management responsibility? Malone's assurances to the employees in July and or August 3 reveal an intention at the outset to retain the inherited complement. The inference thus is pungent that the original intent went into discard upon receipt of the Union's August 8 demand letter and the enlightenment that doubtless ensued about the legal implications of employee carryover.

4. To impart the illusion that the mass termination nevertheless was timely for purposes of avoiding successor-

[21] See, generally, *East Belden Corporation, supra*, 239 NLRB 776, 791–792; *Pine Valley Division of Ethan Allen, supra*, 218 NLRB at 218.

[22] *Galis Equipment Company, Inc.*, 194 NLRB 799 (1972). See also *Georgetown Mfg. Corp., supra*, 198 NLRB at 237.

[23] "A successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor." *N.L.R.B.* v. *Burns International Security Services, supra*, 406 U.S. at 294. This is not so, however, in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit," in which case it is "appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Ibid.* The present case plainly comes within the exception to the general rule. *East Belden Corporation, supra*, 239 NLRB at 793; *Bachrodt Chevrolet Co.*, 205 NLRB 784, 784–785 (1973). See, generally, *United Maintenance and Manufacturing Co., supra*, 214 NLRB 529, 535–536; *Spruce Up Corporation*, 209 NLRB 194, 195 (1974).

[24] E.g. *P. J. Gear & Sons, Inc.*, 252 NLRB 147, 149 (1980); *Valley Iron & Steel Co.*, 224 NLRB 866, 877 (1976); *Sundstrand Heat Transfer, Inc. (Triangle Division)*, 221 NLRB 544, 545 (1975).

[25] The decisions to close, themselves, and the renovations flowing from them involved considerable outlays of capital and thus properly could be made by management independently of the bargaining process. *L. E. Davis d/b/a Holiday Inn of Benton*, 237 NLRB 1042 (1978); *Vegas Vic, Inc., d/b/a Pioneer Club*, 213 NLRB 841 (1974).

ship, Respondent fostered the palpable fictions that the joint venture operating the hotel as of September 23 was substantively different from the Malone/Burkheimer combine in charge during the interim period;[26] and that First Hill, not it, was the employing entity until September 23. In aid of the latter of these fictions, Vukov testified, unconvincingly, that the process undertaken on or about August 1 with respect to tax numbers, licenses, etc., was repeated on or about September 23 ("it was just like setting up a new business"); and Burke, who had had no demonstrable part in the conduct of the business during the interim period, was prevailed upon to lend his name to the termination notices and appear in what might fairly be termed a "cameo role" in conjunction with their issuance.[27]

That Respondent would resort to such artifice highlights the bad faith underlying the mass termination, as part of a resolve to escape successorship and a bargaining obligation.

5. Bad faith or an ulterior motive with regard to the mass termination was revealed, as well, by Vukov's effort to explain, employee-by-employee, why the various employees were unworthy of retention. Her testimony in this respect, as previously observed, "was a labored mix of abstractions, conjecture, and flawed recall," and was together unpersuasive.

6. Also indicative of ulterior motive anent the mass termination were Respondent's nondisclosure to the deposed employees, even as it purported to invite them to apply for rehire, that they had been replaced, and its failure ever to consider any of the resultant applications. The duplicity and the blanket disregard of applications are indicative of a pogrom in avoidance of successorship rather than a reasoned process of selection.[28]

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(5) and (1) of the Act by:

1. Refusing to recognize the Union as the collective-bargaining representative of its employees in the appropriate unit since about August 8, 1980.

2. Discontinuing existing pension and health and welfare coverages, and instituting a new medical insurance program, after August 1, 1980, without first giving the Union a chance to bargain over the changes.

3. Terminating the entire complement of unit employees September 22, 1980, albeit momentarily as concerns some, without first giving the Union a chance to bargain over the decision and its effects.

4. Closing the Sir Dunbar on September 23, 1980, and the hotel proper on December 3, 1981, with attendant loss of unit work for substantial periods of time, without first giving the Union a chance to bargain over the effects of those actions.

Respondent violated Section 8(a)(3) and (1) of the Act by terminating the entire complement of unit employees on September 22, 1980.

ORDER[29]

The Respondent, Michael J. Malone and Bob Burkheimer d/b/a Sorrento Hotel, Seattle, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Hotel, Motel, Restaurant Employees and Bartenders Union, Local 8, AFL-CIO, as the exclusive representative of Respondent's food and beverage and hotel employees in the appropriate unit embraced by the 1978-81 collective-bargaining agreement between Third Brigade Corporation and said Union, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Changing any term or condition of employment of the employees in the aforementioned unit, including pension and health and welfare coverages, without first giving the above Union a chance to bargain over such change.

(c) Closing portions of its hotel business, with attendant loss of unit work, without first giving the above Union a chance to bargain over the effects of such closure.

(d) Terminating an entire complement of unit employees, or a substantial portion thereof, without first giving the above Union a chance to bargain over the decision and its effects on those employees.

(e) Terminating or otherwise discriminating against employees to avoid having to recognize and bargain with the above Union, or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in their exercise of rights under Section 7 of the Act.

2. Take this affirmative action:

(a) Recognize and, upon request, bargain collectively with the above Union, as the exclusive representative of Respondent's employees in the aforementioned unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed document.

(b) Upon request of the above Union, revoke any or all changes in pension and health and welfare coverages made without first giving the Union a chance to bargain, and, if requested, restore coverages as they existed up to August 1, 1980, maintaining such coverages as are restored until Respondent negotiates with the Union in good faith to agreement or to an impasse in negotiations.

(c) Make whole employees who worked in the aforementioned unit at any time on or after August 1, 1980, with interest, for any loss of benefits they may have suffered because of the changes in pension and health and

[26] See fn. 1, *supra*.

[27] Burke's token appearance approximated a device used, unpersuasively, in *Mole Oldsmobile, Inc.*, 152 NLRB 407 (1965).

[28] That Vukov, in her search for replacements for those to be terminated, interviewed employees of a union house about to close does not equate with an absence of unlawful motive as concerns the incumbent employees. Successorship can be as effectively defeated by replacing incumbent employees with those from a union as from a nonunion house.

[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

welfare coverages made by Respondent without first giving the above Union a chance to bargain.[30]

(d) Offer to those terminated September 22, 1980, if it has not already done so, immediate and full reinstatement to their former positions, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or other rights and privileges, and make them whole with interest for any loss of earnings they may have suffered because of the discrimination against them.[31]

(e) Expunge from its files any reference to the terminations of September 22, 1980, and notify those terminated in writing that this has been done and that evidence of those unlawful terminations will not be used as a basis for future personnel actions against them.[32]

(f) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amounts due under the remedial order herein.

(g) Post at the Sorrento Hotel, Seattle, Washington, copies of the attached notice marked "Appendix."[33] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[30] Interest shall be as prescribed in *Olympic Medical Corporation*, 250 NLRB 146 (1980), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[31] Backpay shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest thereon shall be in accordance with the preceding footnote.

It is appropriate that the calculation of backpay presupposes that those working in the food and beverage operation would have been offered recall upon the opening of The Hunt Club, and that those working in the hotel proper would have continued working until its closure, and then been offered recall upon its reopening, but for Respondent's unlawful predisposition toward them and its unlawful failure to negotiate with the Union concerning the effects of the closures upon them

It is further appropriate that this paragraph of the remedial order (d) embrace supervisors, if any, caught in the sweep of the September 22 mass termination, inasmuch as the carryover of supervisors can be relevant to the successorship question and the termination of all, without regard to status, was designed to defeat successorship and thereby interfere with the employees' exercise of rights under the Act. Cf. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 403 (1982).

[32] While more severe remedial sanctions could be addressed to Respondent's unlawful failure to bargain over the effects of closing one, then another, portion of the business for renovation (e.g., *Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc.*, 170 NLRB 389 (1968)), it is concluded that the remedy as above defined is sufficient for purposes of this case.

[33] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."